Prior to the application for this writ the State of Utah had not participated in or been a party to any of the legal proceedings which had taken place. The State, however, by its Attorney General, petitioned this Court for permission to file a brief in support of the petitions for the writ of certiorari. This request was granted and the petitions allowed March 26, 1926. (270 U. S. 639)

On May 31, 1927, this Honorable Court by a divided opinion sustained the Circuit Court of Appeals for the Eighth Circuit, and the cause was remanded for further proceedings. (274 U. S. 640)

On December 9, 1927, the United States, acting upon the suggestion of this court, filed its amended bill. Answers were filed by this petitioner and the Independent Coal & Coke Company. By leave of court the State of Utah filed, on October 22, 1928, its complaint in intervention. Objections were interposed by the government to this application, and overruled November 26, 1928. On February 6, 1929, the United States filed its answer and counterclaim to the complaint in intervention. (R. 70) To this counterclaim Utah filed its reply on March 6, 1929, alleging, among other things, that the action was barred by virtue of the provisions of Section 8 of the Act of March 3, 1891. (R. 93-4-5)

THE DISTRICT COURT rendered judgment June 11, 1929, decreeing the lands to the State of Utah, but denied Petitioner the right to purchase it from the State and provided subdivision 3, as follows:

> "And it is further ordered, adjudged and decreed that the state patent dated February 10, 1920 issued by the State of Utah to the Carbon County Land Company, be and the same is hereby adjudged to be void and of no effect." (R. 97-98)

Appeals were thereupon prosecuted to the CIRCUIT COURT OF APPEALS of the Tenth Circuit, by the United States and by petitioner Carbon County Land Company.

That Court on January 14, 1931, reversed in part the decree of the District Court and awarded the land to the United States, but affirmed the decree against petitioner, Carbon County Land Company. (R. 611-625). (Decree, R.

626, Mandate R. 627) (46 Fed. (2d) 980). From this decision upon the petitions of the State of Utah and your petitioner, certiorari was allowed.

For the first time the rights of the Carbon County Land Company and of the State of Utah under the issues finally joined are now before this Honorable Court for its consideration.

## STATEMENT OF FACTS.

To correctly determine the questions involved it is necessary to know the circumstances and conditions under which title to the lands passed to the State of Utah.

Long prior to the passage of the Enabling Act, supra, the acquisition of coal lands had been the subject of special congressional legislation, with restrictions as to the persons who were entitled to purchase, and the quantity of land which might be purchased. (Rev. Stat. Secs. 2347-8-9, and 2350) Section 2351 then provides that:

> "The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections."

In fulfillment of this provision, the Commissioner issued these rules and regulations. They were known and recognized by the public, and upheld by the Federal courts. Only vacant, unoccupied, surveyed legal subdivisions could be entered. The acreage subject to entry was limited. Only citizens over the age of twenty-one years, or an association, could enter. The land office was required to survey the land, furnish schedules and maps showing lands known to lie without ascertained coal areas, and those known to contain workable deposits of coal. Prices were fixed according to the distance from a completed railroad. The entryman was required to subscribe to an affidavit containing the following:

> "That I am well acquainted with the character of said described lands, and with each and every legal subdivision thereof; that my knowledge of said lands is such as to enable me to testify understandingly with regard thereto; that said lands contain workable coal."

In 1901 a special rule, had long been in force, which provided that,

> "Lands cannot be classified as coal lands unless commercially valuable coal is exposed on each legal subdivision of forty acres proposed for sale."

This rule was in conformity with and upheld by numerous land decisions (Letter of Commissioner W. A. Richards to the Secretary of the Interior, dated September 18, 1905. R. 387). Proof of the mineral character of the land it was held must be by actual production of mineral thereon, not that adjoining lands are of that character, nor that the land may thereafter develop mineral. (Commissioner of Kings County v. Alexander, 5 L. D. 126).

Again, mere proximity of tracts containing coal does not stamp the land upon which no coal has been found as coal land (Scott v. Sheldon, 15 L. D. 361). And the fact that land lies in a mineral belt, and that neighboring tracts contain mineral, does not show the land to be of that character. (Warren v. State of Colorado, 14 L. D. 681; In re John W. Williams, 11 L. D. 46). This doctrine was upheld by Departmental Decision March 3, 1905, where it was held that adjoining lands containing coal did not constitute the lands in controversy to be mineral land, there being no discovery of oil thereon. (San Fernando Oil Co. v. Brady).

And to the same effect there is a like departmental decision in the case of Murphy v. Ford, June 23, 1905. These rules, regulations and decisions had been followed uniformly for many years prior to 1904, by the public, the government land officials, and from 1896, by the Utah State Land Board. There was not even an attempted departure therefrom until after the suggestions contained in Commissioner Richards' communication, supra, which was from one to four years after the coal selections here involved were made.

Under these rules and decisions Utah began the selections of the lands granted to it. Only such lands as had been by the government surveyed, and maps and plats thereof filed in the United States Land Office as non-mineral were open for selection. Thousands of acres were selected, examined, surveyed by the Land Department, and purchased by numerous individuals under these grants between the years 1896 and

1907 without question or protest from the government. These lands were not known mineral lands at the date of these grants, nor at the time of the governmental survey.

The Register and Receiver of the Salt Lake Land office certified the lists of land selected by the State to the General Land Office under affidavits setting forth that:

> "We have tested the accuracy of said lists by plats and records in the office, and we find the same to be correct; and we further testify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands." (R. 307)

Two years after these selections were approved and certified by the Commissioner of the General Land Office, and on January 7, 1907, the government filed its bill of complaint against these applicants and their assignee, the Carbon County Land Office and on September 26, 1907, filed its second amended bill alleging in substance that the applications for selection and the contracts for their purchase were fraudulent, and had been made as a part of a scheme of fraudulently obtaining coal lands. (R. 175-195)

The amended bill excludes Harley O. Milner as one of the defendants. The only judgment prayed by the government was:

(1) That it be decreed that neither the Milners, Gilson, or the Carbon County Land Company acquired any right, title or interest to said land by reason of the contracts made between them and the state of Utah.

(2) That it be decreed that the contracts are void, and that each be surrendered for cancellation.

(3) That the Carbon County Land Company acquire no title or interest in said lands by reason of the assignments of said contracts.

(4) That said parties be directed by proper decree to surrender to the State of Utah for cancellation the contracts referred to in the amended bill.

(5) That one Campbell who held a mortgage on the lands from the company be decreed to have no lien thereon.

(6) That the claimant have such further relief in the premises as may be agreeable to equity and good conscience. (R. 215).

This was not a suit to quiet title in the government, to determine its ownership in the lands, or to cancel its certifications, but was one brought expressly to cancel the contracts made by the applicants with the State of Utah. That this was the purpose of the suit, and the interpretation placed upon the amended bill, is conclusively shown by the fact that on January 8th, 1907, the day following the filing of the original bill F. E. Maynard, Special Assistant to the Attorney General of the United States, appeared before the Land Commissioners of Utah for the purpose of officially informing the Board that the Attorney General had filed a bill in the federal court. He served a copy on the Land Board and asked to have it made a part of its files, and then said:

> "That the State of Utah has *purposely* not been made a party to the bill."

He then read the latter part of the bill, and stated:

> "You will see that the only relief we ask is that you be relieved of your contracts that you entered into with the Milners; that the legal title to the land is in you now, and if the government is successful, will be in the State of Utah. *We do not seek to deprive you of these lands,* but we do seek to prevent these valuable lands from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it."

A representative of the applicants stated that they would not ask for a patent to issue until the terms of the contract had been complied with, and Mr. Maynard replied "that he was willing to let the matter stand until the courts adjudicated the question that is satisfactory to the government. If we are not right in our contention they are entitled to the land. *The legal title remains in the state.*" The State Board then adopted a resolution that final payments for the land would not be accepted until the rights of the applicants

to demand patent shall have been determined by the court. (R. 263-266).

## DECREE.

The cause was tried during January, 1910, and taken under advisement, but the decision was not rendered until January 8, 1914, four years after it had been submitted. And while adverse to the defendants, was not in accordance with the prayer of the complaint. It decreed—

(a) That the plaintiff is the owner and entitled to the possession of all the lands involved.

(b) That plaintiff's title be quieted thereto as against all claims of defendants, or any persons to thereafter claim under them.

(c) That the defendants have no right, title, interest or right of possession in the lands.

(d) That defendants be perpetually restrained and enjoined from setting up or making any claim to said lands.

(e) That the plaintiff is decreed to be the true and lawful owner of the land, and its title quieted as against all claims, demands and pretenses of the defendant. (R. 3).

There is not in the decree the slightest reference to the contracts involved, or that they be surrend[redacted] or cancelled. It was not decreed that the plaintiff in ente[redacted] into the contracts perpetrated any fraud upon the State of Utah, or the government. The State of Utah was not even mentioned. The decree granted injunctive relief which was not prayed for, and determined questions not involved.

## TAFF REPORT.

The bringing of the Milner suit was undoubtedly the result of an investigation made by Joseph A. Taff and his report to the Director of the Geological Survey, and referred to in the letter of Commissioner Richards, supra, to the Secretary of the Interior under date of September 18, 1905. (R. 387) This letter recognized the then existing rules and regulations

under which lands had heretofore been classified and selected. He stated that:

> "The purpose of this letter is to secure a modification of the rule 'that lands cannot be classified as coal lands unless commercially valuable coal is exposed in each legal subdivision of 40 acres proposed for selection', and to this ruling the local United States land office and the State Land Board have been and now are subject."

Again he states, after quoting certain land decisions, that,

> "Selections do not become effective until approved by the Secretary of the Interior, and if at any time before he approves a selection it is determined that the lands contained therein, or any part of them, are mineral in character, they are not subject to selection under the law, and it becomes his duty to cancel the selection, in whole or in part, as the facts may warrant."

There was no suggestion that proceedings should be commenced to set aside classifications which had already been certified and approved. The Commissioner in transmitting the information contained in Mr. Taff's letter said:

> "There is no such showing in my opinion as would warrant the Department in modifying the practice to the extent of holding, as he appears to desire, that lands may be adjudicated to be mineral lands solely upon the geological formation thereof, and of discoveries and developments of mineral on adjoining lands."

He said Mr. Taff mentioned no specific case as furnishing a substantial reason for such modification of the practice, and he recommended that no action be taken unless a report treating special tracts be submitted.

Notwithstanding that all the applications here involved had been made in good faith, and in absolute keeping with the rules and regulations admitted to exist by Commissioner Richards, the Director of the Geological Survey, and Mr. Taff, the Geologist, the Milner suit was commenced, and the acts of the applicants, which up to that time were in every

respect legal and honest, were to meet geological views of Mr. Taff, declared to be dishonest, and their acts characterized as fraudulent.

## DIAMOND COAL CASE.

During the pendency of the Milner action, but in apparent keeping with the suggestions of Mr. Taff, the government brought suit in the District Court for the District of Wyoming against the Diamond Coal & Coke Company, to cancel certain patents on the ground of fraud in securing title under the "Soldiers Additional Homestead Act". This case involved the question of a coal discovery and what was necessary to constitute coal lands. Here the government resorted to the doctrine of "geological inference", and endeavored to establish a new rule as to the proof required to *establish known coal lands*. In this case District Judge Lewis adhered to the established rules and regulations and the proof theretofore for years accepted by the government, and dismissed the bill. The government appealed, and the Circuit Court of Appeals for the Eighth Circuit overruled Judge Lewis (191 Fed. 786) and for the first time United States courts adopted the "geological inference" doctrine, thereby setting aside the rules, regulations and governmental policy which had been in force for nearly thirty years, and under which the Milners and Gilson sought to obtain title to the land in question.

In the Diamond case, however, there was strong evidence of actual fraud by the locaters. This opinion was rendered nearly two years after the Milner case had been submitted. The judgment of the Circuit Court of Appeals was by the Supreme Court affirmed April 6, 1914 (233 U. S. 236).

## GOVERNMENT'S POLICY CHANGED.

This was the first decision announcing this doctrine by the Supreme Court of the United States. It overturned the rulings of the Land Department and Federal Courts, under which hundreds of patents had theretofore been granted, and furnished authority for the District Court of Utah to find for the Government in the Milner case. This it did two months after the decision was announced in the Diamond coal case. The defendants then appealed to the Circuit Court of Appeals for the Eighth Circuit, and on February 15, 1915, following the rule announced in the Diamond coal case, the Eighth

Circuit affirmed the decision of the District Court. (228 Fed. 431)

It was the application of this doctrine of "geological inference" which enabled the court to, in effect, hold that the selections made by the Milners and Gilson, and the contracts entered into by them with the State of Utah, (which for more than thirty years had been held lawful, valid and sufficient to warrant them receiving a patent) constituted fraud, and justified the decree in favor of the government, notwithstanding at the commencement of the action its officials admitted that the government did not own the legal title, and that the Government did not seek to deprive the State of the lands involved. The Government, having succeeded in securing a decree that the defendants had no title or right of possession to the lands, and enjoining them from making any claim thereto by virtue of the contracts, the defendants surrendered them to the State for cancellation, and abandoned all claims thereunder. Everything prayed for was accomplished. The contracts having been voided, the defendants were left without any recourse, and nothing further was required by the Government to carry its decision as against these defendants into effect. Thereafter, the defendants asserted no title to and did not enter into the possession of the lands, but "faded out of the picture", leaving the Government to enjoy the fruits of its victory, but with the legal title to the lands still remaining in the State.

It must be admitted that the Government officials on January 7, 1907, when it filed the original complaint, had full knowledge of the facts in relation to the selection of the lands; that application had been made therefor by the State Land Board, and that the same had been regularly certified by the Secretary of the Interior to the State of Utah, and charged against its land grants. It possessed this information when Mr. Maynard, Special Assistant to the Attorney General, appeared before the State Land Board, and stated; "that the State of Utah has purposely not been made a party to this bill. * * * That the only relief asked is that you be relieved of your contracts, and that the legal title to the land is in you now, and if the Government is successful, will be in the State of Utah." When the Government prevailed in the suit and procured its decree on the 8th of June, 1914, quieting title in the lands against the defendants, and that the applications to purchase and the contracts entered into in relation

thereto were fraudulent and void, nevertheless it made no demand upon the State of Utah to surrender up and have cancelled these certifications. For ten years thereafter the Government officials kept faith with the State of Utah, and sacredly observed the promises, statements and representations made by its duly authorized representative in 1907. During all this time the Government knew the State of Utah acquired and held legal and equitable title to these lands. Yet not the slightest question had been raised or suggestion made that the Government claimed any interest in them. No attempt had been made during this long period of time to correct the records, maps or plats maintained by the Government, or to have them show that it still claimed title, either legal or equitable, to these lands. (R. 566)

Utah was charged in its land grant accounts with the land selected. No entry was made changing these charges, or indicating that the State was entitled to lieu lands in the place of those certified.

The Government was chargeable with knowledge of the provisions of Section 8 of the Act of March 3, 1891, fixing the period of limitations within which it had the right to institute proceedings to cancel the certifications if they were wrongfully or fraudulently made. Notwithstanding this knowledge, and that the last certification was December 1, 1903, they were not called in question in the suit filed in 1907, nor were any proceedings instituted following the decree of January 8, 1914. No demand was made upon the State to surrender these certifications. More than six years elapsed after this decree, before the State, the acknowledged legal owner, disposed of these lands. Then, exercising its rights as a sovereign state, entered into a new and independent contract with petitioner and sold the land at $100.00 per acre, or for $556,228.00.

The Land Company and its assignees never, by virtue of the original contracts, acquired any title to the land. They had merely an option and right to purchase, provided they paid, the purchase price. This they failed to do, and automatically their rights ceased. There was then no title, either legal or equitable, in the assignees or the Land Company. The Government having obtained all it sought in its original suit, that is, the concellation of the contracts with the State, no "suit in aid of the former decree" was necessary "to

obtain the benefiits of that decree." The quieting of the title in the Government as against the Land Company could only have been as to such title, interest or claim as the company then had or asserted. Their rights under the original contracts having been terminated, both by their failure to comply with their contracts, and also by the decree of the court, it could not by any stretch of the imagination be legally contended that the quieting of this title in the Government would relate to a title independently acquired more than six years after the decree relied on was rendered.

This new transaction had nothing to do with the attempt made from sixteen to twenty years before to acquire these lands at $1.50 an acre under a contract held void. Stanley B. Milner died in 1906 before the first action was commenced, and Truth A. Milner and Samuel H. Gilson had passed away before the decree was rendered. Only one of the original stockholders of the Land Company was then interested in the corporation, and he held but a few qualifying shares. It was more than four years after this new transaction before the Government, on May 16, 1924, commenced the present action against this petitioner, the Independent Coal & Coke Company, and Carbon County. More than twenty years had then elapsed after the last certification was made, and more than seventeen years after the Government filed its first bill.

## PENDING CONTROVERSY.

The present bill alleged the original selections, the contracts of sale by the State to the Milners and Gilson, and the assignment of these contracts to petitioner. It pleaded the action brought in 1907, and the decree rendered therein and affirmed. It then alleged:

> (5) "That plaintiff further shows that the State of Utah was not made a party to said suit, and it was believed by the plaintiff that the State would leave to the determination of the courts the question of the right between the Government and those who had misused the agency of the State in acquiring title to the lands and confirm its subsequent action to that determination.
>
> (6) "However, the State of Utah has not seen fit to so conform its subsequent action to the determin-

ation of the courts, but on the contrary, on February 10, 1920, the State issued its patent to said land to Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned. In so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the above mentioned suit.

(8) "That said lands have already been determined to be mineral lands, and as such are not subject to selection by the State, both by decision of this court and the Circuit Court of Appeals, and this question is, therefore, res judicata, and that at all times the title to said lands has been equitable in the United States."

Plaintiff prayed that, having conveyed the legal title to the Land Company that the defendants be adjudged to hold whatever title they had in said lands for plaintiff, and to convey the same subject only to the mortgage taken by the State to secure payment of the purchase price, which mortgage, unless the State would surrender its claim, will form the subject of an independent suit between the plaintiff and the State in the Supreme Court of the United States.

Defendants moved to dismiss the action upon the grounds, (a) that the complaint did not state facts sufficient to constitute a cause of action in favor of the plaintiff, and urged that more than six years had intervened between the time said cause accrued before plaintiff commenced the action, and for that reason it was barred by Section 8 of the Act of March 3, 1891. This motion was granted, and on appeal the trial court was reversed. (9 Fed. (2d) 517).

Certiorari being granted by this Court, the decision of the Court of Appeals was affirmed, and the cause remanded with permission to the Government to redraft its bill (274 U. S. 640). On return of the mandate of this Court, the original bill of complaint was amended (R. 1).

## UTAH INTERVENERS.

The State of Utah then intervened, pleaded its mortgage, and prayed that its title be quieted as against the United States (R. 36). The United States made unsuccessful objection to this intervention. It then filed its answer to the com-

March 3, 1891, and prayed that the Government be denied the relief asked for in its amended bill, and that the defendant have judgment quieting its title to 4,444.28 acres of land, against all claims, legal or equitable, made by the United States.

## DECREE RENDERED.

Upon the trial, the District Court decreed:

(1) That the State of Utah, is as against the United States of America, the owner and entitled to the possession of the lands involved.

(2) That the title of the State of Utah to the lands described be quieted as against all claims of the United States, or any person or persons claiming through or under the United States, and that if the United States of America ever had any claim against the State of Utah for said lands, or to set aside the certifications thereof, that the same was barred prior to the commencement of this action by Section 8 of the Act of Congress, March 3, 1891.

(3) And it is further decreed that the State patent dated February 10, 1920, issued by the State of Utah to the Carbon County Land Company, be and the same is hereby adjudged to be void and of no effect.

(4) That this decree shall not have the effect of adjudicating any rights or liabilities between the State of Utah and the Independent Coal & Coke Company. (R. 97)

## APPELLANT CONTENDS.

### POINT I.

We insist that the trial court was correct in decreeing the land involved to the State of Utah, and in holding that the Government's action to set aside the certifications thereof was barred by the Act of March 3, 1891.

We contend, however, that the court erred in decreeing that the patent issued by the State of Utah to the Carbon County Land Company was void.

It is evident that the learned District Judge concluded that the decision of the Circuit Court of Appeals for the Eighth Circuit (9 Fed. (2d) 518,) and the opinion of this Honorable Court in the case of Independent Coal & Coke Company v. United States (274 U. S. 640), were controlling in so far as the Carbon County Land Company was concerned. With this view we respectfully disagree. When those decisions were rendered, the only parties before the court were this petitioner, and the Independent Coal & Coke Company (the action was dismissed as against Carbon County by the Court of Appeals). The only question for determination was the correctness of the ruling of the trial court in granting appellee's motion to dismiss the Government's bill on the ground that the suit was barred by the Act of March 3, 1891 (28 Stat. 1095, 9 Fed. (2d) 517).

Circuit Judge Lewis in his opinion held that a certification of land by the Secretary under statutory authority therefor *has the same legal effect as a patent,* but that the suit was not brought to avoid a certification, but was rather an acceptance of the Secretary's certification than an attack upon it; that it was no part or purpose of the suit to vacate or annul the certificate, and therefore the statute relied upon had no application.

The Opinion then assumes that the Land Company must have acquired title to the lands involved solely by *virtue of contracts with the State of Utah,* after the decision holding these contracts void. This erroneous assumption could only have been drawn from the Government's bill, and not from the actual facts as will hereafter be seen. The opinion states (9 Fed. (2d) 518):

> "According to charges in the complaint, the legal title passed through the State to that company *after it was finally decided* that as between appellant (United States) and the Carbon County Land Company, all of the land belonged to the United States, and its title thereto was quieted as against the company. Perforce that decree Carbon County Land Company in accepting a patent from the State obtained nothing but the bare legal title. *On the facts stated,* it acquired no beneficial interest in the lands as against the United States, and the purpose of this suit is to obtain and decree that it holds that title in trust for appellant (United

States) and to compel it to reconvey the legal title to appellant * * *. This suit is in aid of the former decree * * *. *If the case stated in the bill* should be made out it would seem clear that the relief sought should be granted."

We would have no quarrel with the opinion if the facts stated in the bill were true, but as will be fully shown, we respectfully insist they are not, so Judge Lewis cautiously stated: "If the facts stated in the bill should be made out" that then the "relief sought should be granted."

As we have heretofore shown, the original suit was brought solely for the purpose of obtaining a decree cancelling the contracts entered into by the Milners and Gilson with the State of Utah. These contracts were declared void and surrendered for cancellation. The Land Company procured no title or interest by reason of the assigned contracts. This was the relief demanded. This was the construction placed upon the bill and its prayer by the Assistant to the Attorney General who commenced and prosecuted the action. True the decree, contrary to the prayer, quieted the title in the Government as against the defendants, but it could not quiet the title as against the State or any person not a party to that action.

At that time neither the Milners, Gilson nor the Carbon County Land Company had any title to the lands. All they ever had were contracts to purchase that were held void. They never secured any deed or patent by virtue of these contracts. This is now shown by the undisputed testimony. So the Government in the present case did not make out "the case stated in the bill." It is true that more than six years after the decree was rendered declaring the contracts void the Land Company, by reason of a new, independent contract secured the legal title to the lands at $100.00 an acre, but not at $1.50 as provided in the original contract.

The Government having obtained all it sought in the original suit, that is, the cancellation of the contracts with the State, no "suit in aid of the former decree" was necessary to obtain the benefits of that decree. The quieting of the title in the Government as against the Land Company could only have been as to such title, interest or claim as the company then had or asserted.

## POINT II.

With due deference to the judgment of this Honorable Court, we feel compelled to dissent from the opinion rendered by Mr. Justice Stone, in Independent Coal & Coke Co. vs. United States, 274 U. S. 640, and particularly from many of the conclusions drawn by him. It will be remembered that three members of this Court did not concur in the majority opinion. There it is stated that:

> "This is a second suit by the United States *and is in aid of the first,* for the restoration of 5500 acres of public lands located in Utah, title to which was procured by fraud perpetrated upon the land officers of the United States."

We earnestly insist that this statement is unwarranted. The Government never by patent, certifications or otherwise passed title to either the Milners, Gilson or the Carbon County Land Company. It did in the usual manner and in accordance with the adopted rules and regulations through its Secretary of the Interior, certify these lands to the State of Utah on and prior to December 10, 1904. In the first suit no attempt was made to set aside these certifications to the State on the grounds of fraud. It is not contended now and never was contended that the State of Utah perpetrated any fraud in the making of these selections. The Government possessed full knowledge of the transaction when it brought suit in 1907, and contented itself with seeking merely to prevent fraud being practiced upon the State of Utah, and not upon it. It sought to set aside contracts made by the State for the sale of these lands at $1.50 an acre, and prevailed. These contracts were cancelled, and this alleged fraud was prevented. The lands were not sold by the State under these contracts. The Government, contrary to the prayer of this bill, did secure a decree quieting its title to the lands as against the Land Company, provided, of course, that company then possessed or thereafter secured title by virtue of these contracts or of the fraud pleaded. The defendants in that action complied with the decree. They neither asked nor secured conveyances from the State under these contracts, and so no aid became necessary to carry into effect the original decree.

Again, it is assumed that when the present suit was filed, that the State and the Land Company had violated the original

decree, and that the patent issued more than six years thereafter was rendered in fulfillment of these void contracts. This conclusion could only have been drawn from the bill, for no answers had been filed, no issues joined, and no proof taken. Beginning with this assumption it is then argued that the Government must have concluded that the State of Utah was not a necessary party, and had no interest in the controversy by reason of the case of Williams vs. United States (138 U. S. 514). In so doing it again had to assume that the State of Utah was in the identical position with the State of Nevada as detailed in the Williams case. Yet such is not the fact as now fully appears from the complaint in intervention filed herein, and from the evidence contained in the record (R. 102 to 593). The opinion then proceeds:

> "Again it is stated that the present suit is founded on the allegations that the State of Utah, not conforming its action to the decision in the first suit, despite the decree and findings of fraud upon which it was based, has conveyed legal title to the fraudulent purchasers. * * * It sets up the equitable title of the interests of the United States in the land *based on the decree in the first suit;* the conveyance by patent of the State's legal interest to the Land Company, and prays that a trust be imposed in favor of the plaintiff, and that defendants be ordered to convey whatever title they had."

Here again it is assumed that the State conveyed the legal title by virtue of the original contracts. This, we respectfully insist, was not true. The opinion then recognizes that the State officials may not have been cognizant of the fraud perpetrated, and that the *legal title of the State was not affected by the decree in the first suit,* and that the United States in an appropriate proceeding might have procured the annulment of the certifications *if it proceeded within the period of limitations.* This is an admission that the legal title was in the State, and is a recognition of the statute of limitations upon which the State and this appellant now relies, and it will not be contended that any attempt was ever made by the Government to set aside this legal title, or cancel these certifications until the Government in the present case filed its answer to the State's complaint in intervention (R. 70-92). Still pursuing the error of assuming that the Land Company's title was the result of the Milner and Gilson contracts, it is

asserted that a legal and valid purchase by the company in a new and independent contract entered into many years after the death of all of the parties charged with fraud,

> "Was a part of the fraudulent conspiracy condemned in the first suit. The decree in the first suit is conclusive that the company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the State and its officials as agencies to procure the transfer." (247 U. S. 646)

To this reasoning we cannot subscribe in the light of the facts in the case. If the Milners and Gilson under their contracts had the right to acquire title to the land upon the fulfillment of contracts which were voided and never fulfilled, then there was neither an equitable or legal title to decree to the Government. In any event it could only be such title as was actually acquired thereunder, and not otherwise. It cannot with reasons be urged that if the sovereign State of Utah held the legal title, and that the time had elapsed in which the Government could rightfully contest this title, that the State could not sell the land and convey good title thereto.

The only question really before this court for determination at that time was whether this action was in effect a suit to cancel the certifications of the Government; and if so, was it barred by the provisions of the Act of March 3, 1891. The court, after indulging in an argument which we feel was not germane to the subject, finally held that it was "not a suit to cancel a certification", and that the statute did not apply. (When the State, however, intervened, and the Government in its answer and counterclaim asked for a cancellation of the certifications, and the State in reply thereto denied the Government's right of cancellation and pleaded the statute of limitations, then it became an issue.) Then though not necessary for a decision of the question before the court the opinion proceeds:

> "We hold that the acquisition of the title of the lands by the Land Company *as set out in the bill,* was in violation of equitable principles, and the decree enjoining the defendants in the first suit from setting up or making any claim to the premises, and that a proper case was stated for the imposition on both petitioners of a constructive trust with respect to the

lands acquired by them. As the bill is not well drafted respondent should have leave to perfect it." (274 U. S. 640)

From the foregoing it is apparent that the court only held that the securing of the title to the land was in violation of "equitable principles and of the decree", and again in effect assumed that the facts were "as set out in the bill".

The bill alleged that the State's contract of sale to the Milners and Gilson was declared void, and then charges that the State, not having conformed its subsequent action to the determination of the courts, but contrary thereto, on February 10, 1920, issued its patent to the Land Company, thereby leaving it open to the conclusion that, notwithstanding the contract had been held invalid, the State nevertheless pursuant to said contracts, issued its patents. This of course was not in accord with the undisputed evidence presented by petitioner and the State of Utah at the trial and as now appears in full in the printed record. (R. 102 to 593)

In the first suit the defendants relied upon the certifications from the Government and the contracts entered into by them with the State. In this case the company bases its claim upon a valid purchase from the State made more than six years after the original decree was rendered and long after the death of all of the individuals charged with having perpetrated a fraud in seeking to purchase from the State the lands at $1.50 an acre.

In the light of the issues finally joined between the Government, the defendants and the intervenor, the State of Utah, we earnestly insist that the opinion delivered by Mr. Justice Stone on behalf of this court is not controlling in this proceeding.

## DECISION OF THE CIRCUIT COURT OF APPEALS.

Upon appeal from the decree of the District Court of the State of Utah, the Circuit Court of Appeals (46 Fed. (2d) 980) affirmed the judgment of the trial court declaring that the patent issued by the State to petitioner was void, but reversed that part of the decision holding that the State of Utah was the owner of and entitled to the lands involved. This opinion for the reasons hereafter stated was wrong.

## SPECIFICATION OF ERRORS.

Your petitioner assigns and specifies error as follows:

1. The court erred in refusing to set aside that portion of the judgment of the trial court wherein it was decreed that "the State patent dated February 10, 1920, issued by the State of Utah to the Carbon County Land Company, be and the same is hereby adjudged to be void and of no effect," thereby violating the constitutional rights of your petitioner to purchase and acquire the land in question in a lawful, valid and legal transaction.

2. The court erred in refusing to reverse the trial court for failing to decree petitioner the relief prayed for in its answer to plaintiff's amended bill of complaint.

3. The court erred in failing to recognize the legal title to the land involved in the State of Utah, and by so doing sought to vest the Government with authority to control the rights of a sovereign state in its private dealings and transactions with individuals or corporations, and in violation of Article 10 of the Amendments to the Constitution of the United States, which provides that, "the powers not delegated to the United States by the Constitution nor prohibited by the states are reserved to the states respectively or to the people."

4. The court erred in refusing to recognize that the legal title to the lands involved vested in the State of Utah after the issuance of the certifications, the Government admitting at all times that the State held such legal title.

5. The court erred in failing to apply the six year statute of limitations prescribed by Section 8 of the Act of March 3, 1891, in favor of the State of Utah, thereby denying to the State title to the lands involved.

6. The court erred in applying to the conduct of the Milners and Gilson between the years 1901 and 1904, which was in accord with the then existing legal standards another legal standard not created or adopted until 1914, and by this error in effect through a retroactive application of the new standard transformed an honest act into a fraudulent one, and then though the State was not a party thereto, held it responsible therefor.

7. The court erred in holding that the United States is not estopped by reason of the representations of the Special Assistant to the Attorney General who was conducting the Milner suit on behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit, and to now allow the Government to claim that the State is concluded by the decree entered in the Milner suits, thereby permitting it to reap an unjust advantage from the misconduct of its representatives.

8. The court erred in holding that the State's rights to the land came from, or were held under, the Carbon County Land Company, and in failing to recognize that the State's rights came from the United States under and pursuant to the Enabling Act of July 16, 1894; and erred in concluding that the State of Utah was the successor to your petitioner, and in failing to appreciate that the State was charged by the United States to the full extent of the acreage involved in partial satisfaction of the grant made in the Enabling Act.

9. The court erred in holding that under the peculiar circumstances of this case the State of Utah is bound by the decree entered in 1914 in the case entitled United States v. Milner, et al., supra. (See this petitioner's petition for writ of error, pp. 9 to 12).

10. The court erred in holding that as to the State of Utah the lands involved in this case were known mineral lands, and that there was, therefore, a material misrepresentation of facts as to the character of the land.

11. The court erred in refusing to validate the legal title to the land in the State of Utah, thereby denying the State the right to sell and dispose of said lands, and denying to your petitioner the right to purchase the same in a lawful transaction.

12. The court erred in holding that petitioner was by the decision in the case of United States v. Milner et al., supra, perpetually enjoined from acquiring title to the lands in question in a lawful, valid manner from the legal owner.

## ARGUMENT.

### I.

**The government seeks to base its right of recovery against this appellant by reason of the injunctive relief granted in the original action.**

In the 1907 suit the Government only prayed for the cancellation of the contracts entered into by the Milners with the State of Utah, and for general relief. (R. 214-216) There was no prayer for injunctive relief, or any demand to quiet the Government's title in the land as against the defendants. The decree rendered, however, makes no reference to the cancellation of the contract, but decrees that the Government is the owner and entitled to the possession of the land, and enjoins petitioner from making any claim to the premises. (R. 3-4) This decree was unauthorized, and violates the well established principle of pleading and the law applicable thereto. Upon this decree, rendered not in keeping with the issues in that case or the prayer of the bill, the Government now claims that petitioner is perpetually enjoined from acquiring any title to the lands involved. We insist that the decree was void in this respect, and furnishes no authority for the Government's contention.

> "Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than it is required, it will be limited by construction so that its effect shall be such, and such only, as it needed for the purposes of the case that has been made."
>
> Barnes, Trustee v. Chicago M. & P. R. Co., 122 U. S. 1;
> Reynolds et al. v. Stockton, Receiver, 140 U. S. 254;
> Clark v. Arizona Ass'n., 217 Fed. 640;
> Cushman et al. v. Warren Paving Co., 220 Fed. 857.

It is well recognized that the prayer for relief is an essential part of the bill in equity, and relief not affirmatively sought will not be granted. The relief granted must conform

plaint in intervention, and counterclaimed against the State, claiming title to the land, and prayed that the "title of the United States in and to the lands be quieted against all the claims and demands of the State of Utah", and in the alternative, that the selection of said land "so made to the State of Utah at hereinbefore pleaded, and set out be delivered up to be concelled, and that the court by its decree cancel and annul the same". (R. 92) This was the first time that the State ever asked a cancellation of the certifications made by the land office. This counterclaim was filed February 6, 1929, or more than twenty-five years after the last certification was made. A reply to this counterclaim was filed by the State of Utah denying in substance that the Government, at the time of the commencement of the action on May 16, 1924, had any interest whatever, either legal or equitable, in the lands described, or that the lands had been adjudicated to be mineral lands, in any proceedings or action wherein the State of Utah was a party, and denied that on May 9, 1904, or at any time prior thereto, the lands were known to contain coal in commercial quantities. It then pleaded that the cause of action set forth in the counterclaim was barred by virtue of the provisions of Section 8 of the Act of March 3, 1891, which provides that, suits by the United States "to vacate and annul any patent" shall only be brought within six years after the date of the issuance of such patents. The State asked that the United States take nothing by reason of its counterclaim, and that it be dismissed for want of equity, and that the lands described in the complaint be decreed to the State of Utah, and that it be decreed to be the absolute owner of said lands, legal and equitable, as against all claims of the United States. (R. 95-96)

## ANSWER OF PETITIONER.

Petitioner in its answer alleged that the extent of the determination made by the decree of 1914, was merely to annul the contracts entered into with the State of Utah and the defendants in that action. It affirmatively alleged that it was not the purpose of the original action to disturb or annul the title of the State of Utah to the land described, but to leave the title vested in the State free from any rights under the contract. It set forth that the State continued to hold said lands free from said contracts, or any rights which might arise therefrom, until February 10, 1920. It alleged that at the time of the certifications and ever since said lands have

been non mineral in character, and have never, as between the United States and the State of Utah, been known or determined to be mineral in character.

> "That while the aforesaid decree finds and adjudicates said lands are mineral in character, and were known to be such at the time of said certification, still said decree could not and did not adjudicate that fact as to the State of Utah, as the State was not a party to said suit and did not in an wise participate in the defense thereof." (R. 48-61)

It was further alleged that the title to said land vested in the State of Utah, and that the State continued to own and possess the land until the title had, by reason of the lapse of time, to-wit, more than six years from the date of the certification, ripened into a perfect title as against the United States, and that while the State was the absolute owner, free from any claims of the Government, the State on February 10, 1920, sold the land to petitioner for one hundred dollars per acre; that the transaction was entirely independent of the transaction involved in the suit decided in 1914; that the purchase from the State was in its capacity as the owner of the land and not as trustee, either actual or constructive, of the United States; that the State issued its patent believing that it was the true and lawful owner thereof, and that the decree rendered in 1914 in no wise interfered with or disturbed either its legal or equitable title.

Defendant pleaded in detail the transaction with the State, the issuance and receipt of the patent; the knowledge of the Government that it had entered into possession of the land in 1920; that it had occupied the possession of the same; leasing a portion to sheep and cattle men for grazing purposes, had caused the land to be placed upon the assessment rolls; that taxes had been assessed upon the property each year, and that it had paid taxes thereon in excess of $15,000.00 prior to the commencement of the action.

It further alleged that in October, 1920, it had sold 1120 acres of the land to the Independent Coal & Coke Company, receiving therefor 369,000 shares of the capital stock of that company, and that that company with the consent of the State had assumed $112,000.00 of petitioner's mortgaged indebtedness. It pleaded that the action was barred by the Act of

to the prayer whereby the party indicates to the court the relief which he demands upon his allegations.

"It is often stated generally as an established doctrine that under the general prayer, relief inconsistent with that asked for by the special prayer cannot be granted."

21 C. J. 683 (Cases cited under note 79);
Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. 934;
Boone et al. v. Chiles et al., 10 Pet. 177, 9 L. Ed. 388;
Hayward v. Elliott Nat'l Bank, 90 U. S. 611, 24 L. Ed. 855;
English v. Foxall, 2 Pet. 595, 7 L. Ed. 531.

Story in discussing the extent to which relief will be granted under the general prayer, states:

"Thus for example an injunction will not ordinarily be granted under a prayer for general relief, but it must be expressly prayed."

Story Eq. Pl. (9 Ed.) Sec. 41, p. 35;
32 C. J. 334, Sec. 552;
Gaines v. Hale, 26 Ark. 168; affirmed 93 U. S. 3;

And it has been held that the rule applies to perpetual, temporary and mandatory injunctions and to restraining orders.

(See cases under Notes 81, 82, 83, 84 and 85, Sec. 552, supra).

Again it is stated in 32 C. J. 278, Sec. 645, that:

"As already shown, the injunction should be confined to the issues raised by the pleadings, and should not be allowed any broader terms than prayed for in the bill, and in any event the restraint imposed by the decree should be no more extensive than is reasonably required to protect the interests of the party in whose favor it was given."

Cincinnati v. Cincinnati Tract Co., 245 U. S. 446;
Hitchman Coal Co. v. Mitchell, 245 U. S. 229;
McNeill v. Southern R. Co., 202 U. S. 543;
(See numerous cases under note 3, Sec. 645, supra).

Again it is stated in the same section, that:

> "The injunction should not be so broad as to prevent defendant from exercising his rights or rights that he may acquire in the future."

New York, N. H. & H. R. Co. v. Interstate Com. Com'n., 200 U. S. 361;
(See cases under notes 4 and 5, Sec. 645, supra).

II.

**Appellant's rights are not controlled by the decree of 1914.**

This court has definitely recognized the doctrine that a party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a newly acquired title.

Barrows v. Kindred, 4 Wall. 399;
Merryman v. Bourne, 9 Wall. 592;
U. S. v. So. Pac. R. Co., 223 U. S. 565.

A decree can be res judicata only as to matters actually decided, or which can be decided in such suit.

Dowell v. Applegate, 152 U. S. 327.

III.

**The Statute of Limitations has run in favor of the State of Utah.**

Under Section 8 of the Act of March 3, 1891, the Government was limited to six years within which to bring its action against the State for the concellations of the certifications issued. This it failed to do. The last certification issued in 1904. The decree in the original suit was rendered June 8, 1914, and affirmed by the Circuit Court of Appeals November 15, 1915. The case at bar was not brought until May 16, 1924. The Government contends that this action was brought to enforce the judgment and decree affirmed in 1915. The State was not a party to that action, and it is evident that this action was not brought within the six years period. It is a general principle of equity that lapse of time may constitute a sufficient defense in the absence of any statute of

limitations, and without necessary reference to any question of laches.

U. S. v. Beebe et al., 17 Fed. 36;
U. S. v. McElroy et al., 25 Fed. 804.

It was held in United States v. Stinson, (197 U. S. 300), that

> "The Government is subjected to the same rules respecting the burden of proof, the quantity and character of the evidence, the presumption of law and fact, that attended the prosecution of a like action by an individual."

This language has been construed by the Circuit Court of Appeals to be, in effect, and have the same meaning, as the language used in the case of United States v. Detroit T. L. Co., 131 Fed. 668, where Judge Sanford uses the following language:

> "Finally this is a suit in equity. The equitable claims of the United States appeal to the conscience of the chancellor with the same, but no greater or less force, than would those of an individual in like circumstances."

This doctrine was upheld in Shooters Island Shipyard Co. v. Standard Shipbuilding Corporation, (293 Fed. 706), where, on page 715, we find the following:

> "It is well settled that when the United States appeared as a suitor it voluntarily submits to the law, places itself upon the same footing as other litigants, and is not entitled to remedies which cannot be granted individuals." (Citing many cases).

And in United States Libelants v. Norwegian Barke Thekla, (69 L. Ed. 126), Mr. Justice Holmes uses this language:

> "When the United States comes into court to assert a claim, it so far takes the position of a private citizen as to agree by implication that justice may be done with regard to the subject matter."

And it was said by Justice Sanborn in United States v. Hines, (298 Fed. 853):

> "No case has been cited, and we think none can be found, sustaining the proposition that the United States, because of its sovereign character when a litigant in one of the courts, is not bound by the rules enacted for the orderly administration of justice. More than thirty years ago, in United States v. Goodrich, (54 Fed. 21), this court held that its rules were binding upon the United States. The United States, when it enters one of the courts as a litigant, lays aside its power, and to the same extent as other litigants, must conform to rules without the enforcement of which the orderly administration of justice in the courts would be impossible."

The courts having repeatedly held that a patent by the lapse of six years is to have the same effect against the United States that it would have had if it had been valid in the first place, then the situation is the same as if there had been no fraud practiced upon the government, and is as if the patent had been properly, legally and fairly issued. A certification having the same legal effect as a patent, the same doctrine would apply.

U. S. v. Chandler, 209 U. S. 447;
U. S. v. Smith, 181 Fed. 545;
Kansas Lumber Co. v. Moores, 212 Fed. 153;
U. S. v. Whited & Wheeless, 232 Fed. 140;
U. S. v. Winona R. Co., 165 U. S. 467.

A suit to impress a trust and compel a conveyance is a disturbance of the title. A suit which has for its object the disturbance of a title is barred if not begun within the statutory period.

U. S. v. Whited & Wheless, 246 U. S. 552;
U. S. v. Bellingham Bay Imp. Co., 6 Fed. (2d) 102.

If the Act of March 3, 1891, which provides that

> "Suits by the United States * * * to vacate and annul patents hereafter issued shall only be

> brought within six years after the date of the issuance of such patent,"

then the effect of the statute was to make good the title conveyed by the certifications to the State of Utah.

> U. S. v. Chandler-Hunt Dunbar Water Power Co., 209 U .S. 447;
> U. S. v. Whited & Wheless, 246 U. S. 552-563.

Obviously the decree in the first suit against the Carbon County Land Company did not affect the title of the State, as it was not a party to that suit. The Government admits that the legal title was then in the State of Utah. If so, it certainly ripened into a good title by operation of the statute of limitations regardless of the character of the land, or the means by which the State procured title.

> Stockley v. U. S., 260 U. S. 532, 542, 543.

At any time within six years from the date of the certifications issued to the State the United States could have brought suit to annul the certifications and to regain title.

> Burke v. So. Pac. R. Co., 234 U. S. 669, 693.

Not having seen fit to do this, the certifications after the lapse of the statutory period became conclusive. That is the very object of the statute.

> Cramer v. U. S., 261 U. S. 219, 234;
> U. S. v. Winona & St. Peter R. Co., 165 U. S. 463.

In the Winona case, speaking of this statute of limitations, the court said: (p. 476)

> "Under the benign influence of this doctrine it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of title providing only that the land was open to sale and conveyance through the Land Department."

The purpose of the statute of limitations was said by this court in U. S. v. Whited & Wheless, supra, to be to "promote prompt action for annulling patents where calls

therefor was believed to exist, and to make titles resting upon patent dependably secure when the statute of limitations should expire." It was "that patent title might be made secure." (pp. 562, 563)

And in Cramer v. U. S., supra, the court said that the object of the statute was, "to extinguish any right the Government might have in the lands * * *".

It is true the statute does not expressly refer to suits to annul titles other than those conveyed by patent, but titles conveyed by certification are clearly within the purposes of the Act.

U. S. v. Whited & Wheless, supra.

Under the well established practice of the Land Department, lands selected by a state are conveyed to the state not by patent but by certification, and as shown above, such certifications are equivalent to patents.

As this court said in Shaw v. Kellogg, (170 U. S. 312, 351):

> " * * * The significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word patent or in the instrument which the word defines. By it the legal title passes, and in whatsoever manner that is accomplished the same result follows as though a formal patent were issued."

It was contended in that case that the ruling in Barden v. So. Pac. R. R. Co. (154 U. S. 288), was not applicable because in the Barden case a patent was involved, but no patent had been issued in the Shaw case. The court expressly rejected that contention.

In U. S. v. Winona & St. Peter R. Co., supra, the United States sued to recover lands which had been certified to the State of Minnesota for the benefit of the railroad company. In considering the equities of the company by reason of the long lapse of time since certification, this court referred to the statute of limitations here involved, and while holding it not applicable because the suit had been brought within the

time prescribed, did say respecting it and another statute (p. 476): "We refer to them as showing the purpose of Congress to uphold titles arising under certification or patent."

Under these authorities we earnestly insist that the Circuit Court of Appeals erred in refusing to apply the statute and to sustain the contention of the State of Utah that it was the owner of the lands and entitled to have its title to them quieted. This error was prejudicial to the rights and the interests of the Carbon County Land Company, for if the State's title was valid then the Land Company had the right in its new independent contract to purchase in a lawful manner the lands in question.

## IV.

**The court erred in refusing to reverse the Trial Court for failing to find the issues in favor of petitioner under the evidence submitted. And in accordance with the allegations of its answer.**

It was alleged and not denied that petitioner purchased the land on January 2, 1920, at $100.00 per acre, and on February 10, 1920, the State executed its patent therefor; that after petitioner entered into possession of the purchased property it sold to the Independent Coal & Coke Company 1120 acres for 369,000 shares of its capital stock, and assumption of $112,000.00 of indebtedness to the State of Utah.

Defendant's Exhibit "B" (R. 263) establishes conclusively that at the time of the filing of the original suit the Government made no claim to these lands. It admitted the legal title was in the State, and that it did not seek to deprive Utah of these lands. It was shown that for more than 17 years this statement was adhered to by the Government. It is fair to assume that when the decree was rendered cancelling these contracts the Government then made no further claim to the lands. If it did, is it not strange that it should allow more than ten years to elapse before instituting any proceedings in relation thereto, and that when it did commence this action it was not for the purpose of divesting the State of its legal title, but for the purpose of having it declared that the Land Company held the equitable title thereto in trust for the Government. Whatever title the Government had, both legal and equitable, was conveyed to the State by the issuance of the certification.

That, petitioner acted in absolute good faith in its dealings with the State of Utah in 1920 is shown by the following testimony.

Clarence E. Milner testified that he was connected with the company in 1920 when it entered into negotiations to purchase the lands; that after the year 1906, and up until 1920, development work had been carried on in coal properties in the vicinity of Kenilworth, Utah, and in view of the new development and the knowledge then possessed they sought to purchase the land from the State, finally agreeing to pay $100.00 per acre therefor; that notes and mortgages were executed and patent received; that the transaction was entered into by the company in good faith, we honestly seeking to acquire title to the land, and have been in possession of it all since receiving patent except 1120 acres sold to the Independent Coal & Coke Company. That the transaction under which the land was purchased in 1920 had no connection whatever with the original contracts. None of the stockholders in the company in 1920 were stockholders at the time of the organization of the company, except Harrison E. Jenkins, who owned twenty shares for qualifying purposes. That the negotiations for the purchase of the land were carried on through their counsel, with the State Land Board of Utah, and the then Attorney General and Governor of the State. (R. 570)

Testimony of like nature was given by Jay S. Milner (R. 572). He was not an incorporator of the company and had nothing to do with the original contract, but was a stockholder in 1920 when the company sought legal advice with reference to who owned the legal title to the land, and particularly as to whether the State of Utah owned such title. That they received an opinion that the title was in the State, and that thereupon negotiations were commenced which resulted in the purchase of the lands and the issuance of patent.

Eli Taylor (R. 559) the Register of the United States Land Office at Salt Lake, testified that the lands in question were all selected by the State and the lists approved as far back as 1904. He detailed the method of preparing these lists, and how the land was selected and approved, and then stated that "Our records still show that the certifications were made to the State of Utah, and show no cancellation."

The testimony given on behalf of petitioner was not denied, and the only evidence offered against appellant was the decree rendered in the original suit on January 8, 1914.

Under this evidence, together with the testimony offered on behalf of the State and the Independent Coal & Coke Company, established petitioner's right to a decree as prayed for.

## V.

**The rights of the Carbon County Land Company are inseparably connected with the rights of the State of Utah and should be considered in connection therewith.**

It is not contended that the State of Utah was guilty of any fraud in the selection of the lands. It acted through its Governor and the Secretary of the State Land Board. The proof submitted by them in the selection of these lands showed that they had investigated the nature and character of the land, and that they were subject to selection under the then existing rules and regulations of the Interior Department and the law as then understood applicable thereto. The lands had been theretofore surveyed and carefully examined by Mr. P. S. Sowers, a government witness, and shown to have been returned as nonmineral land in accordance with the testimony of Mr. J. C. Dick and Edward D. Dunn. When the applications were filed it was shown that the register and receiver certified these lands as nonmineral in character, and were subject to selection under the grants provided for in the Enabling Act. The opinion rendered by the Circuit Court of Appeals states that "We have no disposition to impute to them (the Milners) any moral turpitude, but the fact remains that it has been adjudicated that in a legal sense they fraudulently obtained these lands from the United States." (R. 625) The only way that it was ever found that they were guilty in a legal sense of fraud was that which they did was honest and legal when performed, but by a retroactive interpretation of the law was held to be dishonest and fraudulent. That is, that their acts when performed were honest, but became fraudulent years thereafter by a new interpretation of the rules and regulations of the Land Department and of the decisions which had been in force for a generation. This holding, however, did not involve the State. Its actions in every sense were in keeping with the law, and without any thought of wrong doing.

To now by virtue of the decision in the original Milner case hold that the State was bound by the action of third parties and by a decision in a case to which it was not a party, is a rule to which we cannot subscribe. The State possessed both the legal and equitable title to the land in 1920, and in the exercise of its rights as a state in good faith sold to petitioner the lands. To now have it legally determined that it acquired its title from this petitioner impressed with a constructive trust in favor of the Government is to ignore the plain provisions of the statute and the decisions of this Honorable Court above referred to. The depriving of the State of its title to these lands had the effect of preventing this petitioner from exercising its rights to engage in lawful pursuits and in keeping with its articles of incorporation. This was the effect of the decision of the Circuit Court of Appeals. We cannot believe that it will be upheld by this court.

## VI.

### Certifications not fraudulent.

The certifications obtained by the State from the Government were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the lands involved were nonmineral in character. It was only by changing the standard existing at the time that they were finally held fraudulent, and then the Government sought to bind the State by a decree in an action in which the State was not a party. The decision of the Circuit Court of Appeals holding that Utah is bound by the decree entered in 1914 is in conflict with the decisions of this Honorable Court and with the general law, for a person cannot be bound in an action to which he was not a party.

Wood v. Davis, 7 Cranch. 271, 3 L. Ed. 339;
Brandon v. Ard, 211 U. S. 11, 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229;
Tindal v. Wesley, 167 U. S. 204, 42 L. Ed. 137;
Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209;
Cadwallader v. Harris, 76 Ill. 370;
State v. Cincinnati Tin Co., 66 Oh. St. 182, 64 N. E. 68.

To change the rules and the law with reference to the making of land selections after the selections had been made

in accordance with existing law is a policy that ought not to be adopted, and one that has been condemned by Circuit Judge Sanborn in the case of Clancey v. Barker, 131 Fed. 161. In that case at page 171, this language is used:

> "A retroactive decision which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto statute."

This is exactly what was done in the original Milner suit, and now the Circuit Court of Appeals for the Tenth Circuit has attempted to apply the "constructive trust" theory, and in applying it, to thereby prevent the application of the statute of limitations. This method of reasoning we feel should not be adopted.

## CONCLUSION.

The arguments contained in the learned briefs filed by the State of Utah and the Independent Coal & Coke Company in case No. 42, support petitioner's contention to a very large extent in this case, and in so far as their arguments support the position of this petitioner we request that they be considered by the court.

Prior to 1904, if the Government had classified the lands involved as coal lands, the Milners and Gilson could have purchased them from $10.00 to $20.00 per acre according to their distance from a completed railroad. If it is assumed that the tracts were all within the $20.00 limit (which is not true), the total amount they would have had to pay at that price would have amounted to $111,285.00. Yet when the Carbon County Land Company in 1920 purchased them from the State of Utah it contracted to pay the State $556,428.00, or $445,133.00 more than the Government under any circumstances could have received. If, however, the original applicants had filed an application to enter these lands as coal lands their applications, under the rules and regulations then existing, would have been refused by the Land Office as the land was not classified as coal land. If it is admitted that the attempted purchase under the grant to Utah at $1.50 per acre constituted fraud, then the fraud was only the difference in the price charged for agricultural land and that for classified coal land. The Government in 1907 only brought its ac-

tion to prevent the State being defrauded. Under its then contention it succeeded and left the title in the State. Now when the State makes a profitable deal and in keeping with the Government's original announced purpose, it seeks to prevent the State from receiving the benefits of a transaction which means, if petitioner and the Independent Coal & Coke Company shall take the full time provided for in the mortgage, that the State would receive approximately $1,250,000.00 for its public institutions, and in addition thereto there would be paid in County, State and School taxes, based on the present assessed valuation, more than $1,000,000.00. If the Government shall succeed it will now be limited under the leasing law to a low tonnage royalty, and that of a doubtful nature under the general coal industrial situation. And yet it is claimed that petitioner is seeking benefits from an alleged fraudulent contract never completed. This contention we submit is unwarranted.

To refuse to apply the statute of limitations on behalf of the State in this case means that every title secured by state selections and certifications under the land grants will be subject to future contests if, perchance, coal or precious minerals shall hereafter be discovered on them or in close proximity, when some geological theorist employed by the Interior Department insists that under his expert opinion the doctrine of geological inference should apply. Such a situation would render uncertain and insecure and place the title to thousands of acres of land in jeopardy.

To uphold the Government's position would be to abridge the rights of the State of Utah both under the Federal and State constitutions. It would deny its right to legally transfer its property, and at the same time deny to this petitioner its right to purchase, own and possess property legally acquired.

We earnestly insist that the decree of the Circuit Court of Appeals for the Tenth Circuit be reversed.

SAMUEL A. KING,

*Attorney for Carbon County Land Company.*

PARNELL BLACK,
*Of Counsel.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 42 and 48.—October Term, 1931.

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| State of Utah, and Independent Coal & Coke Co., Petitioners,<br>42 *vs.*<br>The United States of America.<br><br>Carbon County Land Company, a Corporation, Petitioner,<br>48 *vs.*<br>The United States of America. | On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[February 15, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

Certiorari was granted in these cases, 283 U. S. 816, to review a decree of the Circuit Court of Appeals for the Tenth Circuit, by which it reversed a decree of the District Court for Utah and adjudged that the United States was entitled to certain lands described in the bill of complaint and that the petitioners' title to the land is impressed with a trust in favor of the United States. It specifically decreed the cancellation of a certain mortgage and of tax liens on the lands claimed by the State of Utah, and directed conveyance of the lands and an accounting for their use by the other petitioners. 46 F. (2d) 980.

The sufficiency of the original bill of complaint was upheld and substantially all the questions now presented were considered and determined by this Court in *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640. The suit was originally brought against the two corporate petitioners and certain individuals, the state not being a party, and the circumstances, so far as they then appeared, were set out in the opinion of this Court as follows (pp. 642-644):

"This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was

procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances.

"The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (§§ 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See Milner *v.* United States, 228 Fed. 431, 439; United States *v.* Sweet, 245 U. S. 563; Mullan *v.* United States, 118 U. S. 271, 276; § 2318 R. S. The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.

"During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were non-mineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact. On the faith of these and other documents, the selections were approved by the Secretary of the Interior and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

"In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. . . . the bill . . . sought the quieting of the government's

title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States 'is the owner' and 'entitled to the possession' of the lands in question and that the defendants 'have no right, title or interest, or right of possession,' and perpetually enjoining them 'from setting up or making any claim to or upon said premises.' The Court of Appeals, in affirming the decree, held that 'the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of the lands from the United States.' "

In its first opinion, this Court held, for reasons stated and upon authorities cited, that the decree in the earlier suit conclusively established that the Carbon County Land Company was a party to the fraudulent conspiracy to procure certification of the title to the lands to the state; that as against the Land Company and all claiming under it, the United States was equitably entitled to the land; that the Land Company, so far as it had acquired any interest in the land, was not shielded from the consequence of its fraud by having procured a conveyance to the state, even though the latter was not a party to the fraud; and that the Land Company could not acquire any further interest in the property from the state free of the obligation to make restitution of it, which equity imposes on one who despoils another of his property by fraud. *Independent Coal & Coke Co.* v. *United States, supra,* pp. 647, 648.

As the Independent Coal & Coke Company had acquired its alleged interest in the lands subsequent to their certification by the United States, it was held that it took them subject to the equities of the United States unless the defense of bona fide purchaser was affirmatively established, and "that none of the defendants, nor any claiming under them with notice, could by any legal device, however ingenious, acquire title from the state free from the taint of their fraud." Ibid., p. 646-647.

After the cause had been remanded to the district court, the two corporate petitioners answered, and the state, which had contented itself with filing a brief *amicus curiae* when the cause was first here, was permitted to intervene. By its bill of complaint in intervention the state set up that at the time of the selection and certification of the lands it "believed and had ever since believed that the land so certified by it was agricultural in character and it did not contain any known mineral"; that in 1920, which was subsequent to the decree in the first suit, it had entered

into a new contract with the Land Company, under which it had sold and conveyed the lands to that Company for $100 an acre, or a total of $556,428, taking back a mortgage for that amount, and had since assessed taxes, which were liens upon the lands, aggregating $40,000. The Government, by its answer, prayed the cancellation of the mortgage and tax liens or, in the alternative, if that relief were denied, that the certification of the lands to the state by the United States be cancelled.

After a trial upon evidence, the district court, without making findings, gave judgment cancelling the patent from the state to the Land Company and quieting the state's title. The Court of Appeals, in reversing this decree, made findings, which the evidence supports, that the state, as alleged, had, in 1920, patented the lands to the Carbon County Land Company, taking back a mortgage for the purchase price, and that in the same year the Land Company had sold 1120 acres of the land to the Independent Coal & Coke Company, which had notice of all the proceedings, including the final decree in the first suit.

Upon these findings, it is apparent, from our earlier opinion, that neither of the corporate petitioners can retain any interest in the land, as against the United States. As the Coal Company purchased a part of the lands with notice of the equities of the United States against the Land Company, it took subject to those equities and can be in no better position with respect to them than its grantor. The Land Company, a party to the fraud by which the certification of the lands to the state was procured, and to the decree in the first suit which so determined, could not improve its position by taking any further conveyance from the state. However innocent the state and its officials may have been in this transaction, any interest the Land Company could acquire from the state in its own behalf was but the fruit of its fraud and of its violation of the decree against it. This aspect of the case was discussed and passed upon in our first opinion, pp. 647, 648, 649, and the conclusion there reached requires affirmance of the decree so far as it affects the Land Company and the Coal Company.

The State of Utah can stand in no better situation with respect to the mortgage and tax liens which it asserts. A copy of the bill of complaint in the original suit was handed to the State Board of Land Commissioners when the suit was begun in 1907 and the

state has been fully advised of all the subsequent proceedings. By 1904, it had contracted to sell the lands to Milner and associates for $1.50 an acre, payable in installments of 25 cents a year. By virtue of these contracts, the vendees were equitably entitled to the land, and the state's interest was but that of a vendor, having the mere right to retain the title as security for any unpaid balance of the agreed purchase price. See *Williams* v. *United States,* 138 U. S. 514, 516; *Boone* v. *Chiles,* 10 Pet. 177, 224. It was the equitable ownership in the lands thus acquired by Milner and associates and conveyed by them to the Land Company, which the decree in the first suit, in 1914, adjudged to be in the United States.

The Government's allegation in its answer to the intervention complaint of the state, that at the time of the decree the purchase price had been paid in full, was not denied by the state's replication. No evidence on the point was offered, but in the present circumstances we do not think it material. Subject to the state's security title and right as vendor, every interest in the land was vested in the Land Company, whose rights remained unchallenged and unaffected by any action of the state when the decree was entered in the first suit. That decree irrevocably fastened the equities of the United States upon every right and interest which the Land Company had or could procure in the land. So far as the state was concerned, the decree substituted the United States in the place and stead of the Land Company as equitable owner of the land and stripped the latter of power to surrender its interest to the state. The decree[1] was likewise of binding force upon everyone, including the state, who might later knowingly attempt to acquire any new or different interest in

[1]The decree provided "That the plaintiff [the United States] is the owner and entitled to possession of the following described property, to-wit: * * * and that plaintiff's title thereto be quieted against any and all claims of the defendants, or either of them or of any person or persons claiming, or hereafter to claim through or under the said defendants, or any or either of them; that said defendants, and each of them, have no right, title or interest, or right of possession in or to said premises hereinabove described, or to any part thereof; and the said defendants, and each of them, are perpetually restrained and enjoined from setting up or making any claim to or upon said premises, or any part thereof, and all claims of said defendants, and each of them, are hereby quieted."

the land in derogation of the equities adjudged to be in the United States. Even if we were to assume that at the time of the decree there was an unpaid balance of purchase money (which could not have exceeded $1.50 an acre), the state was entitled only to retain its title until payment was made. Beyond this it could make no profit and derive no benefit free of the equitable rights of the United States. Any grant of the lands by the state to the Land Company or to a stranger, without the assent of the United States, would have been in violation of its equitable rights as they had been adjudicated by the decree. See *Gorham* v. *Farson*, 119 Ill. 425; *Houghwout* v. *Murphy*, 22 N. J. Eq. 531, 546-547; *Taylor* v. *Kelly*, 56 N. C. 240.

Ignoring those rights, the state issued a patent to the Land Company, receiving as the proceeds of its wrongful conveyance, the mortgage of the Land Company, an active participant in the fraudulent scheme, to secure the increased payments of $100 an acre. It actively facilitated the conveyance to the Coal Company by the Land Company, by agreeing with both that the state would release from the mortgage the lands conveyed to the Coal Company upon payment of $112,000, which the Coal Company undertook to pay. This attempted enlargement of the state's interest in the lands, in diminution of the equities of the United States, like the conveyance, mortgage, and agreement by which the attempt was made, was a violation of the decree and of the equitable rights confirmed by it, from which the state can take no benefit. This is not any the less the case because the Land Company, as against the United States, could not rightly receive the patent or retain its benefits or grant to any other than the United States any interest in the patented lands.

The state urges that the United States is estopped to assert any claim to the lands as against it by statements made by a Special Assistant Attorney General in a conversation between him and members of the Board of Land Commissioners in 1907, when he delivered to them a copy of the bill of complaint in the first suit. We agree with the court below that his statements cannot be regarded as so inconsistent with the bill as to form any basis for the alleged estoppel. In any case, he was obviously without authority to dispose of the rights of the United States in its mineral lands and could not estop it from asserting rights which he could not

surrender. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408, 409; see also *San Pedro and Cañon del Agua Co.* v. *United States,* 146 U. S. 120, 131 et seq.

It is also argued that the lands were not mineral lands, and that the adjudication to that effect in the first suit is not *res adjudicata* as to the state. That question was again litigated in the present suit, and upon this issue the court below, upon sufficient evidence, found in favor of the United States. See *Diamond Coal & Coke Co.* v. *United States,* 233 U. S. 236. But we do not think that question requires our examination or is open upon the present record. The decree in the first suit adjudicated the equitable rights of the United States as against the corporate petitioners. For reasons already stated, the state has at no time had or asserted any interest superior to that of the United States, except its vendor's title, which it has since relinquished to the Land Company.

In our first opinion we held that the six year statute of limitation of actions to cancel patents granted by the United States, even if embracing a suit brought for cancellation of a certification of lands by the United States, had no application to the relief sought against the corporate petitioners. For the same reason it can have none to the relief granted against the state in accordance with the prayer of the bill. The present suit did not seek cancellation of the certification unless that prayer was denied. It asserts equitable rights to interests in the land derived under and by virtue of the certification. The decree proceeds, and is affirmed here, on the ground that the mortgage and tax liens asserted by the state are subordinate to those rights.

We have considered, but find it unnecessary to discuss, other objections to the decree.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*